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No. 00-1741

Supreme Court, U.S.
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In The

Supreme Court of the United States

COMMUNITIES FOR A GREAT NORTHWEST and NORTHWEST MINING ASSOCIATION,

Petitioners,

v.

ED ARGENBRIGHT, COMMISSIONER OF POLITICAL PRACTICES of the State of Montana, and MIKE COONEY, SECRETARY OF STATE of the State of Montana,

Respondents,

and

I-125 PROPONENTS' COMMITTEE, known as LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND, AND CITIZENS FOR I-125,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court, after enjoining further enforcement of a Montana campaign finance regulation challenged by petitioners, abused its discretion in determining that petitioners were not entitled to the further, extraordinary relief of setting aside an election that was conducted after the campaign finance regulation had been enjoined.

PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE

The identity of the parties should be clarified as follows. Respondent herein is the I-125 Proponents' Committee, a political committee formed under the laws of Montana. Under Montana law, the name of a political committee set forth in its registration statement includes the names of its major contributors, and thus the I-125 Proponents' Committee is also known as the League of Women Voters of Montana, Montana Common Cause, MontPIRG 2030 Fund, and Citizens for I-125. This is the party referred to by petitioners as "Respondent-Intervenors." Pursuant to Rule 29.6, respondent states that it is not a corporation.

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STATEMENT OF THE CASE

1. In 1996, the voters of Montana approved Initiative 125 ("I-125"), which regulates the types of funds that corporations may spend on ballot measure campaigns. I-125, codified as Mont. Code Ann. § 13-35-227, is designed to assure that the state-created advantages of the corporate form, which allow corporations to accumulate capital and wield enormous economic power, are not deployed to give corporations an unfair, state-conferred advantage in the political marketplace. To that end, I-125 prohibits the use of corporate general treasury funds in ballot measure campaigns, while permitting corporations to participate in such campaigns through the use of segregated funds collected from employees, members and shareholders who wish to support the corporations' political activities. Mont. Code Ann. § 13-35-227.

Under I-125, a corporation may continue to use its general treasury funds to pay for the administration of the segregated fund, including the expenses involved in publicizing the corporation's views to, and soliciting contributions from, the corporation's employees, members and shareholders. Mont. Code Ann. § 13-35-227(3); *see* Tr. 46, 10/21/98 (Testimony of Raymond Lazuk); Tr. 87, 10/21/98 (Testimony of Jill Andrews).[1] Nonprofit corporations formed for the purpose of promoting political ideas are exempt from the restrictions of I-125, so long as they do not engage in business activities, have no for-profit corporate members and no shareholders or other

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[1] "Tr. ___, 00/00/00" refers to the transcript of trial testimony in the district court and the date of the transcript volume. "Ex." refers to the numbered trial exhibits.

affiliated persons with a claim on the corporation's assets or earnings, and do not accept more than 5% of their annual revenue from for-profit corporations. Mont. Code Ann. § 13-35-227(4)(a)-(d).

I-125 was modeled on the Michigan statute at issue in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), in which this Court upheld against First Amendment challenge Michigan's segregated fund requirement for corporate independent expenditures in campaigns for elective office. I-125 also was crafted to comply with this Court's decision in *Federal Election Comm. v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), which held that a segregated fund requirement for corporate independent expenditures could not be applied to a nonprofit corporation formed for the purpose of engaging in political, rather than for-profit, activity. The criteria exempting nonprofit corporations from the limitations in Montana's I-125 track those established in *MCFL*. *Compare* Mont. Code Ann. § 13-35-227(4)(a)-(d) *with MCFL*, 479 U.S. at 264. Further factual background on the compelling state interests supporting the adoption of I-125 is set forth in the Petition for Writ of Certiorari in No. 00-1754 (docketed May 24, 2001), at 5-7.

2. After I-125's enactment in 1996, the Montana Chamber of Commerce, together with other corporations, filed suit on February 14, 1997, challenging the constitutionality of I-125 and seeking declaratory and injunctive relief. *Montana Chamber of Commerce v. Argenbright*, No. CV-97-6-H-CCL (D. Mont.) (hereafter, "*Chamber*" case). The suit named the Montana Commissioner of Political Practices, then Ed Argenbright, as defendant (Mr. Argenbright has since been succeeded in that position by

Linda Vaughey). The district court granted leave to intervene to respondent I-125 Proponents' Committee, a political committee formed to support I-125 pursuant to Mont. Code Ann. § 13-37-201. The major contributors to the I-125 Proponents' Committee were the League of Women Voters of Montana, Montana Common Cause, MontPIRG 2030 Fund, and Citizens for I-125.[2]

In April 1998, Montana newspapers reported that I-137, a proposed initiative to ban new cyanide heap and vat leach open pit gold and silver mines, had been submitted to the State of Montana for review. *See Montana Mining Assoc., Inc. v. Mark Siminich*, No. 98-48-H-CCL, Order, March 19, 1999 (D. Mont.), Resp. App. 9. The Secretary of State approved the form of the initiative on May 18, 1998, and it qualified for the November ballot on July 16, 1998. Resp. App. 9. The voters approved I-137 at the November 3, 1998 election, and it was codified at Mont. Code Ann. § 82-4-390.

Opponents of I-137 argued that Montana voters should reject the initiative because it would adversely affect mining companies and employment in Montana. *See, e.g.*, Tr. 24-25, 10/21/98 (Testimony of Ray Lazuk). Under I-125, corporations wishing to fund activities in opposition to I-137 could do so by establishing and

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[2] Under Mont. Code Ann. § 13-37-210(1), the name of a political committee must identify the interests of its major contributors, and the name of the I-125 Proponents' Committee set forth in its organizational statement includes the major contributors listed above. The I-125 Proponents' Committee therefore has sometimes been referred to in these proceedings as the League of Women Voters of Montana, *et al.*

administering segregated funds consisting of donations from employees, shareholders, and individual members, but could not use corporate general treasury funds for such activities. Some opponents of I-137, such as the Montana Mining Association ("MMA"), established a segregated fund in compliance with I-125. Indeed, MMA raised approximately $10,000 through its segregated fund, roughly equal to the amount it had spent to oppose another important mining-related initiative prior to the enactment of I-125, when MMA faced no restrictions on general treasury spending. Tr. 63, 81, 10/21/98 (Testimony of Jill Andrews).

Other opponents of I-137 were exempt from the provisions of I-125 because they were not corporations. For example, Seven-Up Pete Joint Venture, a joint venture of two mining companies that opposed I-137, was free to spend general treasury funds in opposition to I-137 because it was exempt from I-125. Pl. Ex. 88, 89 (correspondence to and from Montana Commissioner of Political Practices confirming that Seven-Up Pete was exempt from I-125); *see* Tr. 452-53, 10/15/98 (Testimony of Ed Argenbright). As of September 1998, Seven-Up Pete had spent $15,452 fighting I-137. Pl. Ex. 809. Individuals who opposed I-137, of course, remained free to contribute and spend their own funds in opposition to the initiative. Tr. 31, 10/21/98 (Testimony of Ray Lazuk).

Still other opponents of I-137, such as petitioners Communities for a Great Northwest ("CGN") and Northwest Mining Association ("NMA"), apparently made no effort to establish a segregated fund for opposition

efforts, as I-125 would have permitted.[3] Both CGN and NMA had individual members who were free to contribute to such a fund. Tr. 126, 10/21/98 (Testimony of Tamara Johnson); Tr. 167-168, 10/22/98 (Testimony of David Rovig) (noting that NMA had many thousands of members). In fact, according to campaign disclosure records maintained by the state, neither CGN nor NMA had ever spent or contributed funds in opposition to any initiative campaign prior to the enactment of I-125, when there was no restriction on their use of general treasury funds for that purpose. Tr. 179-80, 183, 10/22/98 (Testimony of C.B. Pearson, II). The record contains no evidence indicating the amount of funds either petitioner would have spent in opposing I-137 in the absence of I-125's restrictions.

On September 1, 1998, just eight weeks before the election, a group of mining companies and their allied trade associations, including the petitioners herein, filed suit under the First Amendment, alleging that I-125 was unconstitutional as applied to them, and seeking to enjoin further enforcement of I-125. They also sought to enjoin the upcoming election on I-137. *Montana Mining Association v. Argenbright*, No. CV-98-37-H-CCL (D. Mont.) (hereafter, "*Montana Mining* case"). The *Montana Mining* case named Mike Cooney, then the Montana Secretary of State, as well as Mr. Argenbright, as defendants. Mike Cooney

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[3] Petitioners, although organized as nonprofit corporations, include for-profit corporations as members, and derive a substantial portion of their income from donations from for-profit corporations. Pet. App. 74-76. Accordingly, petitioners are subject to the provisions of I-125. Mont. Code Ann. § 13-35-227.

has since been succeeded in office by Robert Brown. The I-125 Proponents' Committee was granted leave to intervene. Pet. App. 33 (Order of September 18, 1998).

The *Montana Mining* plaintiffs, including petitioners, requested that their case be consolidated with the *Chamber* case, which was scheduled for a one-week trial beginning October 13, 1998. *See* Pet. App. 31-33. The plaintiffs agreed that a hearing on their motion for a preliminary injunction against I-137 should be combined with trial on the merits. *Id.* at 31-32. Accordingly, the district court ordered that trial of the *Montana Mining* case would begin immediately following the conclusion of trial on the *Chamber* case. *Id.* All evidence from the *Chamber* case was admitted as part of the record in the *Montana Mining* case. Pet. App. 43. Petitioners did not object to this schedule for consideration of their preliminary injunction motion, although it necessarily meant that no injunction against I-125's restrictions on corporate general treasury spending could issue until the third week of October at the earliest.

3. At the conclusion of the bench trials on October 22, 1998, the district court ruled in favor of the plaintiffs on their First Amendment claim, declaring that I-125 was unconstitutional and enjoining its further enforcement. Pet. App. 36-39. The district court declined to grant the *Montana Mining* plaintiffs' motion for a preliminary injunction against the upcoming vote on I-137. Pet. App. 38-39. The district court issued a written decision and judgments reflecting its rulings on November 20, 1998. Pet. App. 43-60.

On appeal, a divided panel of the Ninth Circuit affirmed the district court's ruling that I-125's restrictions violated the First Amendment, with Judge Michael Daly Hawkins dissenting. The Ninth Circuit also held that the district court did not abuse its discretion in ruling that the *Montana Mining* plaintiffs were not entitled to the unusual relief of setting aside the results of the I-137 election. Pet. App. 20. It rejected as moot the *Montana Mining* plaintiffs' argument that the district court had erred in failing to enjoin the holding of the I-137 election. Pet. App. 19-20.

Respondent I-125 Proponents' Committee and respondent Linda Vaughey, Montana Commissioner of Political Practices, have each filed a petition for writ of certiorari seeking review of the Ninth Circuit's divided ruling on the constitutionality of I-125 (No. 00-1754 and No. 00-1772, respectively). Petitioners herein separately request a writ of certiorari to review the Ninth Circuit's determination that the district court did not abuse its discretion in declining to set aside the results of the I-137 election.

REASONS FOR DENYING THE WRIT

In its separate petition for writ of certiorari in No. 00-1754, respondent herein has explained that the constitutionality of I-125 under the First Amendment presents an unresolved issue of exceptional national importance warranting review by this Court. It does not follow, however, that the instant petition should also be granted.

The instant petition raises only a narrow and unexceptional question of whether the form of relief awarded by the district court reflects an abuse of discretion. The petitioners in this case succeeded in obtaining a permanent injunction against further enforcement of the provisions of I-125 only six weeks after filing their complaint. Pet. App. 38. Thus, the sole question presented by this petition is whether, under the particular circumstances of this case – including the petitioners' failure to commence their lawsuit until eight weeks before the November 1998 election – the district court abused its discretion in declining to award the further extraordinary relief of setting aside the results of the election on I-137. Such a fact-bound, case-specific question, involving routine application of the abuse-of-discretion standard, simply does not present an issue warranting review by this Court.[4]

Contrary to petitioners' contention, the Ninth Circuit's determination that no abuse of discretion occurred here presents no conflict with the decisions of any other

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[4] The petition assumes that the Ninth Circuit correctly decided the important First Amendment question of whether states may restrict the use of corporate general treasury funds to support or oppose a ballot measure, so long as corporations remain free to spend segregated funds raised from interested employees, shareholders and members. Solely for purposes of responding to this petition, respondent indulges the same assumption. As explained in the petitions in No. 00-1754 and No. 00-1772, however, the Ninth Circuit's ruling striking down I-125 conflicts with this Court's decisions in *Austin v. Michigan Chamber of Commerce* and *FEC v. MCFL*. The incorrectness of the Ninth Circuit's decision on I-125, of course, provides an independent reason why petitioners are not entitled to have the I-137 election set aside.

circuits. Instead, the courts of appeals are in agreement that setting aside the results of an election is an extraordinary remedy rarely granted even when actual denial of the franchise is demonstrated – a circumstance obviously not present here. In fact, there is *no* precedent cited by petitioners – and none of which respondent is aware – holding that the results of an election should be set aside following the invalidation of a campaign finance regulation that was in effect during an electoral campaign.

I. The Court of Appeals Followed Settled Law in Declining to Grant the Extraordinary Remedy of Setting Aside Election Results.

The Ninth Circuit broke no new ground in holding that " 'the voiding of a state election is a "drastic if not staggering" remedy.' " Pet. App. 20 (citations omitted). *See, e.g., Gjersten v. Bd. of Election Commissioners*, 791 F.2d 472, 478 (7th Cir. 1986) (invalidating an election is an " 'extraordinary remedy which the courts should grant only under the most extraordinary of circumstances.' ") (citations omitted); *Cook v. Luckett*, 735 F.2d 912, 922 (5th Cir. 1984) (same).

Petitioners incorrectly contend that any finding of a constitutional violation affecting a campaign in any way presumptively entitles a complaining party to an order setting aside the results of an election. Neither this Court's precedents nor those of any lower court establish such a rule. *See, e.g., Connor v. Williams*, 404 U.S. 549, 550 (1972) (if even redistricting plan violated one-person, one-vote requirement of Fourteenth Amendment, court was not required to set aside results of election held

under invalid plan); *Gjersten v. Bd. of Election Commissioners*, 791 F.2d at 478-479 (plaintiffs not automatically entitled to new election even when candidates were unconstitutionally denied access to ballot); *Cook v. Luckett*, 735 F.2d at 922 ("elections will not be set aside absent 'serious voting violations or aggravating factors, such as racial discrimination or fraudulent conduct. . . . ' ") (citations omitted).

The few cases cited by petitioners in which elections were set aside involve actual, systemic denial of the right to vote, or fraudulent conduct affecting the ballot. *See Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (ordering new election because almost ten percent of qualified electorate had been disfranchised by state officials' refusal to count absentee ballots); *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973) (special election was warranted when electorate was defrauded by conspiracy to place sham candidate on primary ballot).[5]

The extraordinary remedy of invalidating the I-137 election is not remotely justified here, as the Ninth Circuit correctly concluded. Pet. App. 20. There is no allegation that any Montana voter was prevented from casting a ballot on I-137, and there are no special circumstances

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[5] Contrary to petitioners' suggestion, Pet. at 25-26, *Smith v. Cherry* does not establish a Seventh Circuit rule requiring that election results be set aside whenever an irregularity may have affected the results. *See Gjersten v. Bd. of Election Commissioners*, 791 F.2d at 478 (holding that election should *not* be invalidated absent extraordinary circumstances); *Rudisill v. Flynn*, 619 F.2d 692, 694 (7th Cir. 1980) (indicating that *Smith*'s result is confined to "fraud [that] affected 'the face of the ballot' ") (quoting *Smith*, 489 F.2d at 1102).

such as fraud or egregious racial discrimination that could overcome the usual presumption against setting aside election results. Instead, petitioners claim only that there would have been more advertising in opposition to I-137 if corporations could have used their general treasury funds throughout the entire campaign period, rather than using segregated funds raised from interested employees, shareholders and members. No case cited by petitioners, and none of which respondents are aware, has ever set aside an election on the theory that the results may have been affected by an invalid campaign finance regulation. It follows that the denial of such unprecedented relief cannot be an abuse of discretion. Prospective relief against further enforcement of the challenged law, which the district court awarded to petitioners, is a fully adequate remedy for the constitutional violation alleged here.

It is equally clear that there is no conflict among the circuits on the remedial issue presented here. Rather, petitioners merely assemble a number of decisions evaluating the propriety of equitable relief in a variety of different factual circumstances. Pet. at 25-26. The only constant among these decisions is the recognition that setting aside an election is rarely justified. Indeed, the cases cited by petitioners as establishing a conflict with the Ninth Circuit's decision consist primarily of rulings *denying* a request to void or enjoin an election. *See, e.g., Gold v. Feinberg*, 101 F.3d 796 (2d Cir. 1996) (vacating a preliminary injunction that postponed an election); *Hendon v. North Carolina State Board of Elections*, 710 F.2d 177 (4th Cir. 1983) (denying request for recount). Petitioners even rely on *Touchston v. McDermott*, 234 F.3d 1133, 1145

(11th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 749 (2001), disregarding the fact that the passage they cite appears in a dissenting rather than a majority opinion.

Further, the Ninth Circuit's ruling on the remedial issue presented here presents no conflict with this Court's First Amendment decisions cited at pp. 11-14 of the Petition. None of these decisions holds that the invalidation of a campaign finance regulation requires a court to set aside an election partially conducted while the regulation was in place.

II. Petitioners' Effort to Establish an Abuse of Discretion on the Question of Remedy Misrepresents the Nature of I-125 and the Record Below.

Petitioners' filing is replete with allegations that I-125 constituted a "gag rule" forbidding citizens to express opposition to I-137. These allegations misrepresent both the nature of I-125 and the record below.

I-125 did not bar the petitioners from opposing I-137. Under I-125, corporations may establish segregated funds for that purpose, just as they may establish PACs that contribute to candidate elections. They may use general treasury funds to pay for solicitations to their members, shareholders, and employees seeking donations to the segregated fund and to communicate their views on an initiative to those same individuals. Tr. 465, 10/15/98 (Testimony of Ed Argenbright). Corporate officers are free to participate in the management of the segregated fund. Tr. 485 (Testimony of Ed Argenbright). Further, corporate officers can continue to advocate the corporation's position on an initiative so long as any work done

on behalf of the corporation is paid for out of the segregated fund. Tr. 1002, 10/20/98 (Testimony of C.B. Pearson, II); Tr. 191, 10/22/98 (Testimony of C.B. Pearson, II). It is thus wholly inaccurate to contend that a corporation's segregated fund does not give the corporation a voice in initiative campaigns.

As far as the record discloses, the petitioners made no effort to establish segregated funds for spending on initiative campaigns. The failure of petitioners to take advantage of available avenues of expression permitted by I-125 substantially undermines their claim of suppressed speech in the I-137 campaign. The record, in fact, contains no hint of the amounts that either petitioner would have spent on the I-137 campaign in the absence of I-125's restrictions. This is perhaps not surprising, because neither petitioner had any record of spending funds on any Montana initiative campaign even before I-125 was enacted. Tr. 179-80, 183, 10/22/98 (Testimony of C.B. Pearson, II). This was true even though previous initiatives, such as I-122, a clean water initiative, were strongly opposed by mining companies. Tr. 76-77, 10/21/98 (Testimony of Jill Andrews).

A member of petitioner CGN incorrectly claimed at trial that I-125 prevented its members and officers from speaking out individually against I-137. Tr. 126-28, 10/21/98 (Testimony of Tamara Johnson). I-125 contains no such prohibition. CGN member Tamara Johnson's uncertainty as to what kinds of advocacy CGN, its officers, and its members could engage in arose out of confusion about what constitutes an in-kind contribution by a corporation. *See* Tr. 124-28, 10/21/98 (Testimony of Tamara Johnson). I-125, however, did nothing to change the

definition of or reporting requirements for in-kind contributions. Tr. 470, 10/15/98 (Testimony of Ed Argenbright). Corporations were already required to disclose any in-kind contributions they made when their officers participated in ballot campaigns on behalf of the corporation, even before I-125 was enacted. I-125 merely requires that, if a corporate officer participates in a ballot campaign *as an employee of the corporation*, the value of the in-kind contribution (such as the officer's salaried time) must be reimbursed from the segregated fund that I-125 allows. Tr. 1002, 10/20/98 (Testimony of C.B. Pearson, II); Tr. 191, 10/22/98 (Testimony of C.B. Pearson, II).

Furthermore, I-125 did not prevent a corporate officer or member from speaking out against I-137 in his or her individual capacity. Indeed, Ms. Johnson, CGN's only witness at trial, organized a public rally against I-137. Tr. 40-41, 10/21/98 (Testimony of Ray Lazuk). Corporate officials such as Ray Lazuk, the Environmental and Public Affairs Superintendent of plaintiff Golden Sunlight Mines, attended the rally. *Id.* Mr. Lazuk also obtained publication, in a Montana newspaper, of a letter to the editor speaking out against I-137. Tr. 30, 10/21/98 (Testimony of Ray Lazuk); *see also* Tr. 48, 10/21/98 (Testimony of Ray Lazuk).

A number of plaintiffs' witnesses acknowledged that their corporations had failed to take advantage of options that remained open to them under I-125. Ray Lazuk testified that Golden Sunlight Mines never so much as wrote a letter to its employees informing them about I-137 or asking for their support in opposing it, all of which is perfectly permissible under I-125. Tr. 29, 10/21/98. Lazuk's company did not establish a segregated fund, nor

did it ask its parent company, Placer Dome, whether the parent company had segregated funds available for opposition efforts. Tr. 36-37, 10/21/98 (Testimony of Ray Lazuk). The company did not even include any mention of I-137 in the regular employee newsletter. Tr. 29, 10/21/98 (Testimony of Ray Lazuk). Montana's Secretary of State, Mike Cooney, observed that corporations appeared to be deliberately avoiding lawful means of participating in 1998 ballot campaigns to improve their litigation position in the I-125 lawsuit. Tr. 884-885, 10/20/98 (Testimony of Secretary of State Mike Cooney).

Furthermore, the plaintiffs below who did make an effort to raise funds within the constraints of I-125 had a remarkable degree of success, considering that 1998 was the first election season governed by I-125. For example, prior to I-125, the Montana Mining Association spent $10,140 opposing I-122, a water quality initiative that the MMA considered very important to its members. Tr. 76-77, 10/21/98 (Testimony of Jill Andrews). After the enactment of I-125, MMA established a ballot measure PAC that had already raised over $10,000 to oppose I-137 by the time of trial. Tr. 63, 10/21/98 (Testimony of Jill Andrews).

Similarly, the Montana Education Association ("MEA") established a ballot issue PAC that in 1998 gave a total of $32,000 to two ballot issue campaigns concerning taxation issues. Tr. 190, 192, 10/13/98 (Testimony of Eric Feaver). This may be compared to MEA's expenditures on ballot measure campaigns from 1990 through

1996, before I-125 was enacted: in all but one of those years, MEA's ballot campaign spending was less.[6]

In contending that I-125 "muzzled" opposition to I-137, petitioners also ignore the fact that non-corporate opponents of I-137, including individuals and partnerships, remained free to spend unlimited amounts to oppose the initiative. For example, Seven-Up Pete Joint Venture, a joint venture of two mining companies that opposed I-137, had spent $15,452 fighting I-137 as of September 1998, two months before the election. Pl. Ex. 809; *see* Tr. 452-53, 10/15/98 (Testimony of Ed Argenbright).

Given the substantial opportunities for opposing I-137 that I-125 left open, I-125 clearly did not deprive the public of the opponents' viewpoint. The district court's statement that the corporate voice was "silenced" by I-125 was not binding on the Ninth Circuit or this Court, because it was based on an incorrect understanding of the law. As this Court held in *Austin*, a corporation's ability to use segregated funds for political expenditures means that the corporation's voice is *not* being silenced. 494 U.S. at 660 (noting that Michigan's statute "does not impose an absolute ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds.") Similarly, in *MCFL*, this Court noted that a requirement of

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[6] *See* Tr. 202, 10/13/98 (Testimony of Eric Feaver) (in 1990, MEA spent $1,600 on CI-55 and $10,000 on I-111; in 1992 and 1993, MEA made no expenditures on ballot measures; in 1994, MEA spent $4,400 on CI-25 and a combined total of $70,000 on CI-66 & 67).

using segregated funds "is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in *First National Bank of Boston v. Bellotti.*" 479 U.S. at 259 n.12. The district court never discussed *Austin*'s or *MCFL*'s holdings on this point. The Ninth Circuit was not required to defer to findings based on a misapprehension of the governing law. *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485, 501 (1984). In addition, given the evidence summarized above, the district court's finding was clearly erroneous as a factual matter.

Finally, the petitioners' delay in filing suit also weighs against their demand to set aside the election. The district court enjoined further enforcement of I-125 only six weeks after petitioners filed their lawsuit, with eleven days still remaining prior to the November 3, 1998 election. Petitioners' failure to obtain an injunction against I-125 at an earlier point in the I-137 campaign is entirely the result of their decision to wait until September 1, 1998 to file suit, and their subsequent agreement that the hearing on their claims should commence following the conclusion of the *Chamber* case. Given that signature-gathering for I-137 began in April 1998, *see* Resp. App. 9, petitioners clearly could have sought injunctive relief against I-125 at an earlier point in the election cycle.

For all these reasons, the district court did not abuse its discretion in denying petitioners' request to set aside the results of the I-137 election.

III. Any Contention that the District Court Erred in Failing to Enjoin the I-137 Election is Moot.

The petition suggests that, in addition to determining whether the I-137 election should be set aside, this Court should determine whether the I-137 election should have been enjoined. *See* Pet. at 28-29. This Court, however, lacks subject-matter jurisdiction to address that question, because, as the Ninth Circuit noted, the question is moot. Pet. App. 19-20; *see Hall v. Beals*, 396 U.S. 45 (1969) (challenge to residency requirement for voter registration was moot where election had already passed and plaintiff was eligible to vote in next election). The election on I-137 has already been held, and in future initiative elections petitioners would be protected by the permanent injunction against I-125 that was entered by the court. Accordingly, no exception to the mootness doctrine is available here, and this Court lacks jurisdiction to determine whether I-137 should have been enjoined. *See generally Preiser v. Newkirk*, 422 U.S. 395, 401-402 (1975).

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court deny the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

* * *

MONTANA MINING ASSOCIATION, Inc., a non-profit corporation; MAJESTY MINING, INC., a Montana corporation, and YELLOW BAND GOLD, INC., a Montana corporation,

Plaintiffs,

-v-

MARK SIMONICH, in his official capacity as Director of the Montana Department of Environmental Quality; JOSEPH GERBASE, RUSSELL HUDSON, KIM LACEY, DAN DENNEHY, ROGER PERKINS, GARON SMITH, and JOHN DOE, all in their official capacities as members of the Montana Board of Environmental Review; MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and

CV 98-48-H-CCL

ORDER

(Filed Mar. 19, 1999)

MONTANA BOARD OF ENVIRONMENTAL REVIEW,

Defendants,

and

MONTANA ENVIRONMENTAL INFORMATION CENTER; MONTANANS FOR COMMON SENSE MINING LAWS – FOR I-137; and MONTANA COUNCIL OF TROUT UNLIMITED,

Defendant-Intervenors.

* * *

Before the court is Plaintiffs' motion for preliminary injunction. Oral argument was heard on January 22, 1999, and post-argument briefing was completed on February 8, 1999. The court, having heard the arguments of the parties and having considered the briefs, is prepared to rule.

Procedural Background

Plaintiffs filed their original complaint on November 4, 1998. By their complaint, Plaintiffs seek declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202. The focus of Plaintiffs' complaint is November 3, 1998, passage of a Montana ballot initiative, Initiative 137

("I-137"), which prohibits cyanide leach processing at any new open-pit gold and silver mines or expansions to existing mines. Plaintiffs argue that I-137 is unconstitutional and that its passage violated their constitutional right to procedural and substantive due process. Plaintiffs filed their Fourth Amended Complaint on February 2, 1999.

In a related case, one of the Plaintiffs, Montana Mining Association ("MMA"), had also filed a complaint[1] on September 1, 1998, challenging the constitutionality of Initiative 125 ("I-125"), which had been passed by Montana voters in 1996. MMA complained that I-125 violated its First Amendment right to free speech in the political arena because it prohibited corporate contributions to ballot initiative campaigns. MMA also complained that it was being prevented by I-125 from campaigning against I-137 in the 1998 election cycle. The court consolidated trial on the merits in MMA's I-125 suit with the trial pending in another case[2] challenging the constitutionality of I-125. On October 22, 1998, after hearing closing arguments in the MMA trial challenging I-125, the court ruled from the bench. The court decided that I-125 was unconstitutional and enjoined the State of Montana from enforcing it against the MMA during the I-137 ballot initiative campaign, of which there were eleven days remaining. Based on the testimony presented at trial, the

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[1] *Montana Mining Association, et al. v. Argenbright, et al.*, CV 98-37-H-CCL.

[2] *Montana Chamber of Commerce, et al. v. Argenbright, et al.*, CV 97-6-H-CCL. The October 13, 1998, trial date had been set on April 22, 1998.

court also found that many factors influence election outcome, particularly the political values, predispositions, and party loyalty of the voters, and that neither money nor media advertising is the sole or even the single most important variable controlling election outcome. Thus, the court decided MMA's constitutional challenge to I-125 approximately seven weeks after MMA filed its complaint.

Legal Standard for Preliminary Injunction

> "In this circuit, the test for granting a preliminary injunction is whether a party has demonstrated: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation, and the balance of hardships tips sharply in favor of the party seeking relief."

Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073 (9th Cir. 1996) (*citing Sierra Club v. Marsh*, 816 F.2d 1376, 1382 (9th Cir. 1987)). In addition, when the public interest is involved, the court must examine whether the public interest favors the preliminary injunction applicant. *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) (*citing Caribbean Marine Serv. Con. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988)). When the subject of the proposed preliminary injunction is a law enacted for protection of the public interest, the applicant may be held to a higher standard of showing a likelihood of success on the merits of the claim. *See Toy Mfr. of America, Inc. v. Blumenthal*, 806 F. Supp. 336, 340 (D. Conn. 1992), *aff'd* 986 F.2d 615 (2nd

Cir. 1993). Because injunctive relief is an equitable remedy, the court may consider an equitable defense such as laches in determining whether to exercise its equitable powers. *Banks v. Bd. of Educ.*, 659 F. Supp. 394, 397-98 (C.D. Ill. 1987).

Discussion

Plaintiffs seek an order enjoining the State of Montana from enforcing I-137, which prohibits new permits for cyanide heap leach processing. Plaintiffs assert that they have shown serious questions on the merits of their claims because the 1998 election process was fundamentally flawed due to the operation of I-125 (prohibiting corporate contributions to ballot issue election campaigns), and that this fundamental flaw violated Plaintiffs' right to substantive due process. Plaintiffs acknowledge that the court struck down I-125 on October 22, 1998, leaving eleven days to campaign without the prohibitions imposed by I-125, but Plaintiffs claim that this was insufficient time for them to conduct a successful opposition campaign.

Plaintiffs analogize their circumstances to those of the plaintiffs in *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) (state election procedures for vote counting did not violate substantive due process), *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), *cert. denied*, 459 U.S. 1012 (1982) (state's refusal to hold special election deprived voters of constitutional right to fill judgeship vacancy), and *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) (state's retroactive invalidation of absentee and shut-in ballots for primary election violated due process).

Those cases discuss a federal court's power to invalidate a state election when the state's electorate is disenfranchised. Here, Plaintiffs argue that because the Montana electorate was deprived of Plaintiffs' full and complete (albeit hypothetical) opposition campaign, the Montana electorate was completely disenfranchised in the November 1998 election. Plaintiff Yellow Band Gold raises the possibility of irreparable injury by asserting that a delay on its permit application could jeopardize its existence as a business.

Upon being questioned by the court regarding the reason for MMA's delay in waiting to file its I-125 challenge on September 1, 1998, counsel for MMA stated that I-137 was not certified for the ballot until July 16, 1998. After certification, Plaintiffs brought a petition for relief before the Montana Supreme Court and waited approximately one month for that court to decide the petition. One week after that petition was denied, Plaintiffs filed both the instant lawsuit and a similar lawsuit in state district court.

Defendant State of Montana ("Montana") argues that Plaintiffs have not demonstrated a likelihood of success on the merits. Montana also asks the court to balance the equities by considering Plaintiffs' unjustified delay in filing their complaint.

Montana also questions the propriety of the remedy sought by Plaintiffs. Montana points out that the constitutional violation complained of was caused by I-125. This court struck down I-125 eleven days before the I-137 election. Montana argues that the appropriate remedy for the finding that I-125 was invalid was to strike down

I-125, not to throw out another law (I-137) merely because it was enacted following a campaign during which I-125 was partially in effect.[3]

From Montana's point of view, to throw out I-137 because I-125 was unconstitutional severely penalizes the Montana citizens who voted on I-137 and essentially gives the I-137 election to Plaintiffs as compensation for the I-125 constitutional violation.

Finally, Montana contends that there was no disenfranchisement of Montana voters in the I-137 election. A voter information pamphlet was mailed to the home of every registered voter, explaining the elements of I-137 in a balanced fashion and providing both a proponents' and an opponents' view of the measure. No Montana voter was prevented from voting in the I-137 election. There was no procedural irregularity in the election process itself. Defendant Montana argues that ultimately there is no way for Plaintiffs to prove that the I-125 prohibitions in effect until October 22, 1998, affected the outcome of the I-137 election on November 3, 1998.[4]

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[3] The court notes that the Supreme Court case cited by Plaintiffs in oral argument, *Buckley v. American Constitutional Law Foundation*, 1999 WL 7723 (Jan. 12, 1999), accords with Defendant Montana's argument because it was the offending Colorado statutes regulating the petition process that were struck down as unconstitutional, not the laws enacted during the time period when petition regulations were still in effect.

[4] *Griffin v. Burns*, 570 F.2d at 1079-80, briefly touches on this issue, stating that the outcome test may be applied to determine whether an election was controlled by an invalid process and judicial intervention is warranted, but that mathematical precision is not required.

For all of these reasons, Defendant Montana argues that Plaintiffs' likelihood of success on the merits of their due process claim is minimal and inadequate to meet the threshold requirement for the issuance of a preliminary injunction. As for the threat of irreparable injury to Plaintiffs Yellow Band Gold and Majesty Mining, Montana's position is that any injury found by the court can be compensated by Defendant Montana under Plaintiffs' Fifth Amendment takings claim. Finally, Defendant Montana asserts that the court should consider the equitable defense of laches when determining Plaintiffs' application for preliminary injunction.

Laches

The court has raised *sua sponte* the potential application of the equitable defense of laches to the application for preliminary injunction. The parties have provided supplemental briefing on the point, Plaintiffs arguing that laches is not applicable, and Montana and Defendant-Intervenors arguing that laches is available to them as a complete defense to the application for preliminary injunction.

The relevant facts are as follows. The constitutionally infirm I-125 measure was passed by Montana voters in November, 1996, and it prohibited corporations from contributing to ballot initiative campaigns. On February 18, 1998, this court set down trial in the *Montana Chamber v. Argenbright* case (which challenged I-125) for May 18, 1998. On joint stipulation and motion of the parties to that case, the court vacated the trial date on April 22, and

reset the *Montana Chamber* trial for October 13, 1998. But for the parties' request, the case would have been tried and decided in the spring of 1998.

In mid-April, Montana newspapers reported that a proposed ballot initiative to prohibit cyanide heap leach open-pit mining had been submitted to the State of Montana for review. On May 18, 1998, the Montana Secretary of State approved the form of that initiative, a fact which was reported by the Montana press. The I-137 proponents began circulating signature petitions the next day. On May 24, 1998, the Montana press also reported the issuance of an opinion by the Commissioner of Political Practices in response to a query from the Seven-Up Pete Joint Venture (developers of a proposed open-pit gold mine) regarding the application of I-125 campaign prohibitions to it vis-a-vis the I-137 opposition campaign. On July 16, 1998, the Montana Secretary of State certified that the requisite number of signatures had been gathered to place I-137 on the ballot in the November 3 election. On November 3, 1998, a majority of the Montana electorate voted in favor of I-137.

Plaintiffs claim that they did not believe that the requisite number of signatures would be gathered until July 16, 1998, and that furthermore they would not have had standing to challenge I-125 until I-137 was certified on July 16.

Defendant-Intervenors argue that Plaintiff MMA was not diligent in filing its challenge against I-125. The MMA lawsuit was not filed until eight weeks before the election. Despite this late challenge, the court did try MMA's case, and the court found I-125 unconstitutional with

almost two weeks of the I-137 campaign remaining. Defendant-Intervenors assert that they need only show that Plaintiffs' delay was unreasonable and resulted in prejudice to the Defendant. *Knox v. Milwaukee Bd. of Elections Comm'rs*, 581 F. Supp. 399, 402 (E.D. Wis. 1984).

Laches can be used to bar a plaintiff's claim entirely, *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990), or simply to deny temporary injunctive relief, *Banks v. Bd. of Educ.*, 659 F. Supp. 394 (C.D. Ill. 1987). Once lack of diligence is established, it becomes plaintiff's burden to justify the delay. *PAC for Middle America v. State Bd. of Educ.*, 1995 WL 571887, *3 (N.D. Ill. Sept. 22, 1995). When plaintiffs do not assert a timely preelection challenge, "they will be barred from the equitable relief of overturning the results of the election." *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988). This is so because the voiding of a state election is considered to be a "drastic if not staggering" remedy. *Id.* at 1180 (quoting *Bell v. Southwell*, 376 F.2d 659, 662 (5th Cir. 1967)).

In summary, Defendant-Intervenors conclude that the length of Plaintiff MMA's delay is serious, that Plaintiffs have advanced no reasonable excuse for the delay, and that the delay has had the prejudicial effect of allowing an entire election to be thrown into question, which is a direct threat to political continuity based on the finality of elections. Here, Defendant-Intervenors argue that the heart of laches "is not, like [a statute of limitations], a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced. . . . " *Holmber v. Armbrecht*, 327 U.S. 392, 396 (1946) (quoting *Galliher v. Caldwell*, 145 U.S. 368, 373 (1892)).

Defendant-Intervenors point out that the offending campaign law was passed in 1996, and that Plaintiff MMA waited until September 1, 1998, to challenge the application of that campaign law to a November, 1998 election. Defendant-Intervenors charge that Plaintiff MMA delayed suit for five months after the I-137 ballot initiative process was underway and had been publicized in the Montana press, leaving virtually no time for this court to determine the issue before the campaign. Defendant-Intervenors challenge Plaintiff MMA's excuse that it did not believe that the I-137 proponents would be able to gather enough signatures for the ballot as being a weak excuse, given the historical context of the I-137 issue and the publicity attendant to it. Moreover, this excuse offers no justification whatsoever for Plaintiff MMA's six-week delay after certification of I-137 for the ballot.

Defendant Montana also argues that the defense of laches should bar Plaintiffs' request for preliminary injunction as a result of Plaintiffs' unexcused delay. Defendant Montana also cites *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988), a case wherein plaintiffs filed a suit two months after a special initiative election was held. The plaintiffs in *Soules* claimed that the decision to hold the special election involved an Equal Protection Violation, but the district court and the appellate panel agreed that laches barred plaintiffs' claim because they "knew the basis for their alleged equal protection challenge well in advance of the proposed special election and . . . failed to explain

adequately their failure to press the claim before the election." *Id.* at 1182.[5]

Montana asserts that in this case Plaintiffs likewise knew the basis for their constitutional claim well in advance of the November, 1998, election, yet failed to press the claim in sufficient time before the election to allow for any remedy other than voiding the election. Montana asserts that Plaintiffs' unexcused delay, given the remedy sought, results in extreme prejudice to Montana's voters and to the state electoral process.

Montana argues that it is not enough merely to file a pre-election complaint, but that the party challenging the election must timely file a pre-election complaint, *i.e.*, leaving sufficient time to cure the problem before the election. Montana cites *Barthelmes v. Morris*, 342 F. Supp. 153 (D. Md. 1972), wherein a district court decided that plaintiffs' request for an injunction against the election of delegates to the Democratic National Convention was barred by laches because plaintiffs had waited until less than eight weeks before the election to file their lawsuit.

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[5] The Ninth Circuit panel in *Soules* notes that there is a line of cases holding that parties challenging state election procedures must bring their complaints before the election, not after, unless there is no opportunity for preelection filing. *Soules*, 849 F.2d at 1180. Failure to file a preelection complaint that allows the problem to be cured before the election justifies the application of laches as a complete bar to the equitable relief of invalidating the election. *Id.* (citing *Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1008 (9th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979); *United States v. City of Cambridge*, 799 F.2d 137, 141-42 (4th Cir. 1986); *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 188-83 (4th Cir. 1983); *Hart v. King*, 470 F. Supp. 1195, 1198 (D. Haw. 1979)).

Id. at 159-61. Montana concludes that had Plaintiffs filed a timely pre-election challenge, the constitutional problems of the I-137 campaign could have been cured prior to the conclusion of that campaign.

Analysis

This court regards a preliminary injunction as a serious matter, "a very far reaching power never to be indulged in except in a case clearly warranting it." *Sierra Club v. Hickel*, 433 F.2d 24, 33 (9th Cir. 1970). In this case, the court must balance the constitutional violation alleged by Plaintiffs and the requested remedy of invalidation of a state election, with the good of the public, the public interest in political continuity and the integrity of state elections, and concerns of federalism and state sovereignty. *See Soules*, 849 F.2d at 1180 (citations omitted). In addition, the court must weigh the fairness of a request that a state election be invalidated in light of Plaintiffs' delay in filing suit until the matter could not be resolved before the alleged violation was well underway.

Here the court returns to the question it posed during oral argument, *viz.*, why the Plaintiffs did not file their claim earlier. Plaintiffs first response, that they filed their claim with the Montana Supreme Court, is inadequate. Plaintiffs simply do not explain their failure to file earlier. Plaintiffs' argument that they did not believe that sufficient signatures would be gathered to put I-137 on the ballot is not credible given the history of the I-122 clean water campaign in 1996 and the response of I-137 as a

follow-up petition – not to mention the publicity garnered by the petition gathering itself. Even accepting Plaintiffs' assertion, which this court cannot do, Plaintiffs fail to explain why they did not file their lawsuit immediately when I-137 was certified for the ballot on July 16, 1998.

The court rejects Plaintiffs argument that they did not have standing to challenge I-125 until I-137 was certified for the ballot in July. Certainly Plaintiffs had standing and the matter was ripe as soon as the form of proposed initiative I-137 was approved by the legislative services division of the State of Montana in May, 1998. *See Michigan State Chamber of Commerce v. Austin*, 788 F.2d 1178, 1183 (6th Cir. 1986) (challenge to campaign finance law ripe before ballot initiative qualified for ballot to afford sufficient time for judicial review); *see also American for Medical Rights v. Heller*, 2 F. Supp.2d 1307, 1313 (D. Nev. 1998) (plaintiffs have standing before initiative qualifies for ballot because injury imminent during petition gathering phase).

It is plain to the court that Plaintiffs knew of the threat directed at their mining activities when petition gathering began in May, 1998. Plaintiffs knew the election would be held in November, 1998. Plaintiffs MMA waited until September 1, 1998, to file their lawsuit. Plaintiffs Yellow Band Gold and Majesty Mining waited until November 4, 1998, to file their lawsuit. The I-137 campaign began no later than July 16, 1998. Waiting until September 1, 1998, to challenge I-125 virtually ensured that any problem could not be cured prior to the I-137 election.

In a Fourth Circuit case, the panel stated that "failure to require pre-election adjudication would 'permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action.' " *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983 (quoting *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973)). In the Ninth Circuit, this has been called "sandbagging." *Soules*, 849 F.2d at 1180.

I do not know whether this occurred here. What I do know, and so find, is that there is insufficient explanation for the delay, and the court must consider this in weighing the equities.

Defendants are unfairly prejudiced by the prospect of having a state election invalidated. Furthermore, the court is not convinced that Plaintiffs have shown a possibility of irreparable injury or a balance of hardships tipping sharply in their favor such as would justify a preliminary injunction.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' application for preliminary injunction is DENIED.

The Clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 18 day of March, 1999.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States
District Judge